Spencer's Art Law Journal

Edited by Ronald D. Spencer

Editor's Note

This is Volume 6, Issue No. 2 of *Spencer's Art Law Journal*. This Spring/Summer issue contains one essay, which will become available on Artnet, August 2016.

After the Knoedler Trial: This essay is about the Knoedler litigation and what it means for future art buyer fraud claims. Perhaps the most astonishing aspect of this art world disaster is the large number of sophisticated and experienced art experts who were fooled by the fake paintings.

It is tempting to dismiss the Knoedler litigation as a one-off event because of the large number of fakes sold over many years. But numerous art sales of authentic pieces will often contain some of the same factual elements identified in the Knoedler forgery sales.

Three times a year, this *Journal* addresses legal issues of practical significance for institutions, collectors, scholars, dealers, and the general art-minded public.

— *RDS*

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AFTER THE KNOEDLER TRIAL: This case is quite likely to produce an increase in fraud claims by unhappy art buyers - recognizing that "red flags" can get their fraud claim decided by a jury. The problem for future sellers of authentic pieces is that some red flags are not unusual in art transactions.

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Ronald D. Spencer

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This essay is about the Knoedler litigation and what it means for future art buyer fraud claims. Perhaps the most astonishing aspect of this art world disaster is the large number of sophisticated and experienced art experts who were fooled by the fake paintings — museum curators, scholars, conservators, foundations, authors of catalogues raisonnés and abstract expressionist specialists like David Anfam, Christopher Rothko and Ernst Beyeler of the Beyeler Foundation. (Many experts are explaining how they arrived at their views — "only viewed a transparency"; was not asked to "authenticate"; "just glanced it", etc.)

It is tempting to dismiss the Knoedler disaster as a one-off event because of the large number of fakes sold over many years. But numerous art sales of authentic pieces will often contain some of the same factual elements identified in the Knoedler forgery sales.

And, numerous future art sales will also raise questions similar to those presented in Knoedler: (1) How should sellers describe experts' views when then the experts have not "authenticated" the art, or indeed, have responded with only generically positive statements, (2) will there be a "prestigious art gallery rule", whereby buyers who become fraud plaintiffs need not exercise any (or less) diligence when purchasing from a "prestigious gallery" and (3) will art adviser involvement in art sales change seller's disclosure or buyer's diligence obligations?

While there has been some public speculation after the Knoedler trial about the "unregulated" nature of the art market, and the dealer art market in particular, (implying that buyers might be better protected), the practical consequence of the Knoedler litigation is that buyer fraud claims and art seller risk is likely to substantially increase — RDS

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INTRODUCTION

Over a period of eleven years, ending in 2008, twenty-three forged abstract expressionist paintings (said to be by nine different "ab-ex" artists) were sold by Knoedler Gallery. These paintings had no documented chain of ownership and were said to be owned by an unidentified (but, in reality, non-existent) owner. In 2013 a buyer brought a fraud claim (it being too late under the four year statute of limitations to rely on the more usual contract claim for breach of authenticity warranty) against Knoedler Gallery and its Director, Ann Freedman, for selling a forged "Rothko" painting. For the buyer to prove a fraud claim, the buyer had to show that the seller actually "knew" that the painting was a forgery, thereby requiring a jury to determine Knoedler's and Freedman's intent or state of mind. (For proving fraud, it would *not* be enough to simply show seller's negligence, that is, the seller *should have known* the painting was a forgery.) At the time of sale, many experts and art scholars had been shown the forgeries and asked to comment, and many (not all) exhibited varying degrees of enthusiasm for the fake paintings.

Plaintiffs Must Prove Both Seller's Intent to Defraud and Buyer's Reasonable Reliance

In order not to burden the courts and legitimate commerce with fraud claims from careless buyers wishing to overturn long concluded art sales, New York law requires that a buyer claiming to be defrauded have taken reasonable steps to protect himself against the seller's deception. Thus, in order to win a fraud claim, the buyer must prove not only seller's fraudulent intent, but buyer's self-protective diligence. These two elements (seller's intent and buyer's diligence) are factual determinations to be made by a jury, *provided there is some evidence from which the jury could reasonably draw these factual conclusions*. The question, then is what amount and nature of evidence would allow a judge to send the evidence to a jury for its decision? The Knoedler litigation suggests that, where (as here) the art is an admitted forgery, the evidence of (a) fraudulent intent and (b) buyer due diligence can be fairly slim or ambiguous — as this essay will detail below.

The Claim Over a Forged Rothko Painting

In 1996, a little-known art dealer living on Long Island, Glafira Rosales, approached Knoedler Gallery in New York City to sell paintings on behalf of the unidentified son of an unidentified (deceased) owner, a resident of Mexico, "Mr. X", who had supposedly purchased many paintings by well-known abstract expressionists during the 1950s and 60s - purchased directly from artists and without any documentation of sale. Through 2008, Knoedler sold 23 Rosales-sourced abstract expressionist paintings from Mr. X, at the rate of about two paintings a year, for prices ranging from several hundred thousand dollars to $15.3 million. In 2014, Glafira Rosales confessed that these paintings (the "Rosales Paintings") were forgeries by a Chinese artist, who by then had fled to China.[1]

In 2011, Pierre Lagrange, the buyer for $15.3 million of a "Jackson Pollock" painting in 2007, sued Knoedler Gallery and its Director, Ann Freedman, for breach of warranty of authenticity and fraud. Many other buyers of Rosales Paintings subsequently brought claims in the New York Courts. The first of these claims to go to trial (in February 2016) was brought by Domenico and Eleanore DeSole (sometimes, "DeSole" or "DeSoles") who purchased a "Rothko" in 2004 from Knoedler.

It is important to understand that in 2013, when the DeSole plaintiffs brought their claim, they could not successfully claim breach of warranty. The buyers' warranty claim over the fake Rothko painting (based on the Knoedler invoice describing the piece as by Rothko) under New York's Arts and Cultural Affairs was barred by the statute of limitations as of 2008, four years after the DeSole 2004 purchase.

Thus, after 2008, any DeSole claim necessarily turned, from a straight-forward contract (warranty) claim for the sale of a picture warranted to be by Rothko, into a fraud claim. This meant that, prior to 2008, the buyers could have gotten their purchase price back, by showing that the painting was more likely than not a fake (and Knoedler had no reasonable basis for believing otherwise) — read for this, that Knoedler was *mistaken*. After 2008, in order to get their purchase price back, the buyers had to prove that Knoedler *knew* that the painting was a fake at the time Knoedler sold it in 2004, and prove that guilty knowledge by "clear and convincing evidence" — the fraud burden of proof ("highly probable", versus the usual civil claim standard, "more probable than not").

Proving seller's actual knowledge, is not enough. To prevail on a fraud claim under New York law, a buyer/plaintiff must establish: (1) seller's intent to defraud by means of a material misrepresentation with knowledge of the misrepresentation's falsity, and (2) buyer's justifiable (reasonable) reliance on the misrepresentation (that is, did the plaintiff buyer do enough to protect himself). Thus, a defrauded New York art buyer has to prove two basic elements: First, the seller actually *knew* that the art was a forgery, and second, that the buyer's reliance on the seller's misrepresentation was reasonable, that is, the buyer exercised some reasonable diligence in protecting himself against the fraud.

That said, while the burden of proof to win a fraud claim is high, the professional, reputational and financial implications of a fraud trial can be devastating for a defendant. Therefore all art merchants should be concerned about the fairly minimal showing of ambiguous evidence that seems sufficient for a fraud claim to proceed to trial.

Proving fraudulent intent — the key element of a fraud claim

The issue of whether the defendants, Knoedler/Freedman, had the necessary fraudulent intent, that is, an intent to deceive by knowingly selling a fake Rothko painting, comes up squarely in Judge Paul G. Gardephe's October, 2015 decision to deny the defendants' motion for summary judgment. Knoedler and Freedman argued that no jury could reasonably conclude "by clear and convincing evidence" (the fraud standard for proof) that they acted with intent to deceive, that, is to say, they *knew* that the DeSole "Rothko" painting was a forgery.

Allegations Deemed Sufficient to Get to a Jury on a Fraud Claim in the Knoedler Case

In his 2015 opinion, ruling that the issue of fraudulent intent would have to go to a jury for decision, Judge Gardephe stated that the DeSole buyers "offered ample circumstantial evidence demonstrating that Freedman acted with fraudulent intent and understood the Rosales Paintings were not authentic." Plaintiffs' evidence, as described by Judge Gardephe, was the following: [2]

1. "fabricated stories of provenance", which shifted dramatically over time;
2. "efforts to concoct a cover story with Rosales";
3. Rosales' willingness to repeatedly sell purported "masterworks" to Knoedler for a fraction of their value on the open market;
4. Rosales' refusal to share any meaningful information about the purported source of the paintings;
5. Rosales' unwillingness to sign a statement representing that the paintings were authentic;
6. Rosales' inconsistent accounts of the size and scope of Mr. X's collection;
7. the absence of any documentation;
8. the October 2003 IFAR Report which rejected the "concocted provenance tale concerning Ossorio and raised serious doubts about the authenticity" of a "Pollock" painting.

Implications for Future Art Disputes: One or Two Problematic Factors May be Enough

In a potentially troubling quotation for future art sellers, it may be that, for Judge Gardephe, proof of only *one or two* of the above-listed eight items of evidence would be enough to deny summary judgment in favor of the seller, and for a jury to conclude that seller had a fraudulent intent. Thus, Judge Gardephe quoted the following language approvingly:

> if, as to the issue on which summary judgment is sought, there is any evidence in the record from any source from which a reasonable inference could be drawn in favor of the [buyer], summary judgment is improper.[3]

The fact that one or two of these items might be sufficient for a fraud claim should be worrisome to art dealers because many of the above-listed evidentiary items are commonplace in art transactions.

Implications for Art Market from Circumstantial Evidence which Judge Gardephe Decided Would Allow a Jury to Conclude that Seller Actually Knew Artwork Was Forged

Buy Low, Sell High

One allegation that Judge Gardephe held that a jury could rely upon to conclude that the seller knew the paintings were forged was Rosales' willingness to sell paintings for a fraction of their value on the open market: *i.e.*, the "buy low, sell high" factor.

This factor should be troublesome to all dealers, because it means that dealer markup can be a red flag for fraud, and these markups can seem quite high to non-experts. There can be a significant spread between the price paid by the gallery to the (seller) consignor and the price ultimately paid by the collector. Even for ordinary consignments, gallery commissions are often in the 50% range. If several dealers and advisors collaborate to connect a buyer and seller, for smaller percentages, the total commissions can quickly mount. Dealers who invest

principal and hold paintings for a number of years may also rightly feel that they are entitled to a reward for intelligent (and perhaps risky) purchases and the time-value of their money. But buyers can become aggrieved if they learn what the seller was actually paid, especially if the buyer hoped to re-sell quickly for a profit, but cannot. It should be worrisome for dealers if knowledge of the gap between the price paid to the seller and the price paid by the end-buyer is grounds for alleging fraud.

It is also well-accepted that for many artists, lack of a certificate of authenticity or inclusion in the accepted catalogue raisonné will reduce the selling price. In the *Knoedler* case, the Rosales Paintings had (a) no identified owner, (b) no documented provenance at all, (c) were not listed in any catalogue raisonné of any of the supposed artists — Rothko, Pollock and other abstract expressionist artists, and (d) no art scholar had ever published *any* of the Rosales Paintings as authentic. Hence, their "value on the open market" was highly speculative because there hardly existed a commercial "open market" for the Rosales Paintings. And, it can be assumed the judge intended "open market" to mean a functioning public market of potential buyers. One could cite the lack of provenance or non-inclusion in a catalogue raisonné as a red flag in an art transaction, but it is odd to regard a low purchase price reflecting these risks as an independent basis supporting a fraud claim.

To the extent there was a private market *among art dealers* for the Rosales Paintings, (There was *no public auction market* since major auction houses would not auction art not listed in the accepted catalogue raisonné.), such a private market required a dealer to invest substantial money in the hope that successful and convincing research on provenance and authenticity would produce a buyer over time. Money, research and time translate into much increased dealer cost; so a dealer would be obliged to sell at a very substantial mark-up.[4]

On the buy side of the transaction, a buyer such as DeSole, would understand he was purchasing a piece for $8.4 million, not listed in the accepted Rothko Catalogue Raisonné, with the authenticity and provenance issues noted above. Perhaps the buyer also understood that he might be paying less because of these facts and, accepting a risk — a risk the buyer felt was covered by his seller, Knoedler. Art world consensus on authenticity is, in large part, based on expert opinion and provenance. Expert opinion, of course, implies sometimes widely varying degrees of reliability and certainty, and provenance often will have gaps and mistakes. The result is that many, and perhaps all buyers of high-end visual art are taking on (in widely varying degrees, depending on the specific art) a certain amount of "authenticity risk" (reflected or not in the purchase price), a risk the buyer may be able to transfer to the seller (for the four year statute of limitations period) by means of a contractual authenticity warranty from seller.

Confidentiality Regarding Seller's Identity

A refusal or inability to provide identifying information about the seller or provenance can certainly be a matter for concern, but it is a fairly common situation. For better or for worse, it is routine for a selling dealer to refuse to disclose the name of the seller or previous owners, or to make their contact information available so that the ownership history can be verified. Some consignees and purchasers will resist this, especially when the artwork in question does not have a documented sale or exhibition history, and will demand disclosure, subject to a non-circumvention agreement, so that the provenance can be verified. But the buyer knows at the time of the sale if the previous ownership history has been disclosed. Thus, it should concern art dealers if the fact that this information has not been disclosed can be used after the sale to support a fraud claim.

Consignor's Refusal to Represent the Works Were Authentic

Whenever a dealer sells a work, and lists the name of the artist, a warranty of authenticity that the dealer has reason to believe the work is by that artist is incorporated in the sale terms, unless it is explicitly disclaimed. Since Rosales was not an expert about abstract expressionist art in general, nor expert on Rothko, it would not be usual for a dealer to insist on Rosales' personal representation or opinion, beyond a representation that she could transfer good title (which representation she apparently delivered). Auction houses make a similar limited warranty — that is, that the attribution is consistent with current scholarship, and do not provide an absolute warranty that if the attribution turns out to be incorrect, the purchase price will be refunded. While perhaps a refusal by seller to make a contractual representation might be a red flag, all dealers should be concerned that a

seller's refusal to agree to a contractual warranty that is more stringent than the commercial norm was considered a red flag for fraud.

Conflicting Analysis or Opinion which the Seller Regards as Flawed

In the Knoedler case, an October 2003 IFAR Report rejected an Ossorio provenance and raised serious doubts about the authenticity of a "Pollock" painting (one of the Rosales Paintings). This item of circumstantial evidence cited by Judge Gardephe as evidence of fraud a jury could consider, points out the hazards dealers can encounter if they investigate a work, and have a great deal of information, and disclose only some of it, especially if some of the information is negative.

Sharon Flescher, Executive Director of IFAR (International Foundation for Art Research), testified at her 2013 pre-trial deposition about this Rosales Painting as follows:

Q. Okay. Is it fair to say, some of the specialists IFAR consulted expressed the view that the work was not attributable to Jackson Pollock?

A. Yes.

Q. And is it fair to say that certain experts expressed the view that the work could be attributed to Jackson Pollock?

A. Yes.

* * *

Q. What did IFAR conclude with respect to [the] work?

A. That we had considerable concerns about the work and that we could not, therefore, come up with a positive opinion, but we expressed some positive statements about the work at the same time, but we could not come up with a positive opinion.[5]

Thus, the question with respect to the IFAR Report (not disclosed to the buyer and not publicly available), is what importance should be given to a summary report of conflicting expert opinions, some supporting, and some rejecting, the authenticity of a Rosales Painting, as well as rejecting a proposed element (Jackson Pollock's friend, Alfonso Ossorio) in its provenance. Does the non-disclosure of this Report and its reference to negative expert opinions support the buyers' position that the seller knew that the DeSole "Rothko" was a forgery? For purposes of deciding seller's fraudulent intent, the answer to this question depends, in part, on whether a selling art dealer must disclose the existence of negative expert opinion with which the dealer does not agree (assuming, of course, the dealer has a reasonable factual basis for the dealer's positive opinion).

Knoedler Not an Isolated Case: Similar Argument in Taylor Thomson Against Christie's

This problem of selective disclosure of negative information is not unique to the Knoedler case. It also arose in an English dispute involving a purchaser from Christie's. This difficult question of a seller's obligation to disclose negative information was addressed in *Spencer's Art Law Journal, Fall 2013: A Seller Should Have Reasonable Grounds for His Unqualified Authenticity Opinion. But How to Weigh Negative Facts? And Must These Negative Facts Be Disclosed If They Are Unknown to the Buyer?*.

In 2005 an English Court of Appeal decided *Taylor Lynne Thomson v. Christie's,*[6] involving a 1994 London auction sale to Thomson, for almost £2 million, of a pair of Louis XV porphyry and gilt-bronze two-handled vases. In 1998 some art dealers suggested to her that the vases might not be Louis XV, but high quality imitations (not forgeries) made in the mid-19th century worth no more than £25,000. Thomson brought an action against Christie's on the ground that the vases were made in the 19th century, claiming that Christie's owed her a duty of care which they had broken in not warning her of a risk that Christie's judgment that the vases were made in the 18th century might be questionable or wrong.

Thomson said that Christie's should have qualified their sale catalogue for the vases to describe them as "probably Louis XV" or a similar qualification because, at the 1994 sale date, there were facts known to

Christie's which should have led Christie's to be cautious about their dating of the vases. Thus, in addition to the existence of the 19th century imitations, (Thomson testified that she would *not* have bought the vases had Christie's told her of the existence of the 19th imitations) there was an absence of any provenance prior to a 1921 purchase by the grandmother of the seller, Lord Cholmondeley. As well, Christie's had relied for its opinion that the vases were made in the 18th century upon the exercise of their judgment, based only a visual inspection, that is, without any physical analysis of the materials utilized in the vases.[7]

The *Thomson* case illustrates the risk that sellers incur when they weigh competing evidence, a situation frequently encountered when dealers estimate the creation date for antiques and antiquities. In *Thomson,* the buyer did not prove that Christie's dating was incorrect, but claimed that, if she had known everything that Christie's considered that might cut against the dating of the work to the 18th century but ultimately decided was outweighed by competing evidence and its in-house expert opinion, she would not have purchased. And the court did not reject out of hand as preposterous the notion that a seller needs to educate a buyer not only on the particular work, but on the type of art and its art-historical context.

While the *Thomson* case was decided in favor of Christie's, the implication of the Knoedler case is that the more a dealer knows, the greater the risk that an undisclosed fact or opinion can provide a basis for the buyer's fraud claim to proceed to a jury, even if the dealer has a plausible explanation for why that fact or opinion was not disclosed.

Is Caveat Emptor *Alive in the Art World? Can the Seller Remain Silent? That is, Must All Negative Facts Be Disclosed?*

Sellers should also be concerned about how the failure to disclose was analyzed in *Thomson* — based on the buyer's arguments that those undisclosed facts were negative and that disclosure would have made a difference to her purchase decision. Most art transactions involve (some) undisclosed facts, at the very least, names of the immediate previous owners. And, if a legitimate problem with the art is discovered (usually after the statute of limitations has expired on the seller's contractual authenticity warranty) the buyer can point to even minor undisclosed negative facts to support a fraud claim.

Many court decisions and tort treatises state that there is "no affirmative duty of disclosure between parties dealing at arm's length." Silence, as such, i.e., mere nondisclosure, does not constitute a breach of duty.[8] The harshness of this rule has been mitigated by limitations and exceptions that have gone a long way toward swallowing up the rule — but not yet all the way.[9] One important exception to this rule (the so-called "special facts" doctrine) is where the seller has superior information, not reasonably available to the buyer.[10] Thus, failure to disclose that a work is not listed in a catalogue raisonne would not be a breach of duty, because the contents of a published volume is public information reasonably available to the buyer. But it still leaves sellers vulnerable if they withhold non-public information from a buyer who can plausibly claim after the sale that the information would have made a difference to the purchase decision.

One Imperfect Solution: Tweaking the Legal Standard

Some commentators have suggested raising the bar slightly for "mere nondisclosure," by requiring a plaintiff to identify undisclosed information that would have been "basic" to the transaction, rather than just "material."[11].

> The second Restatement of Torts has tried to formulate a rule embodying this trend [mandating more disclosure] by requiring one party to a business transaction to disclose to the other, before the transaction is consummated, "facts basic to the transaction" if the former knows that the other is about to act under a mistake as to such facts "and that the other, because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts." Facts "basic to the transaction[12] are those that go to its essence (for example, the character of the thing sold), and the concept is narrower than materiality, which covers also facts that are important only as "inducements to enter into"[13] the transaction.[14]

This proposed distinction by the Restatement between nondisclosure of "basic" and "material" information might make a difference in some cases. If there is an error in the listed provenance, but no claim that the work is not authentic, perhaps such a fact is not "basic" because it does not pertain to the "character of the thing sold."

But the distinction between "basic" and "material" information may simply lead to more difficult line-drawing in art cases. For example, under the reasoning in *Thomson*, would the dating of an antique Chinese vase be "basic" to the transaction? The "nature" of the object would still be an antique Chinese vase, and not a modern forgery.

The *Thomson* case also illustrates the risk that sellers incur when they weigh competing evidence to estimate the creation date, a situation frequently encountered with antiques and antiquities. In *Thomson*, the buyer did not prove that Christie's dating was incorrect, rather that, if she had known everything that Christie's considered that might cut against the dating of the work to the 18th century (but ultimately decided was outweighed by competing evidence) she would not have purchased.

Another Imperfect Solution: Contracts that Shift Burden Entirely to Consignors to Disclose "All Information"

Some dealers and auction houses address this with a contract that requires the seller to warrant that "all information" about the artwork has been disclosed. That seems intended to shift the risk entirely to the seller, and allow the sale to be rescinded for *any* nondisclosure, even if it is not arguably material. This hardly seems preferable or practicable. It is also sometimes directly contradicted by the parties' conduct at the time of sale. If a seller warrants in the contract that he is sharing all information, but the contract also states that the artwork's provenance is simply "private collection," does that demonstrate that the buyer knows the buyer is proceeding on limited information and is satisfied with the information received?

The other alternative is more detailed contracts setting forth more specific warranties, and allocating responsibilities for due diligence, more like other commercial acquisitions. But, that is simply not how the art market currently operates.

Significance of: (1) Expert Opinion/Comment; List of Experts having Viewed the Painting; Absence of Formal Authentications; (2) Public Exhibitions of Rosales Paintings. And, Open Questions for Future Cases: How Much is the Seller Required to Disclose about the Experts' Reactions and How Optimistic can the Seller's Description of these Expert Reactions Be?

Risk Arising from Oral Communications with Experts

It should also concern art dealers that the dealer's characterization of oral communications with experts identified at the time of sale was held to support a fraud claim. A buyer knowing the names of the experts consulted by seller is able to confirm expert views prior to the purchase. Should a buyer be allowed to wait until after purchasing to do so? Here, the court said, yes. But two parties to a conversation will often remember it differently. And, after a work is shown to be inauthentic, it is human nature for experts to recall caveats they believe were expressed or implied at the time. This places dealers, relying on experts unwilling to put their views in writing, at risk of a fraud claim based on hindsight.

It should be noted that nearly all the experts and scholars to whom Freedman showed the "Rothko" for their comment or "thoughts" (see Christopher Rothko's deposition testimony below), and whose names appeared as having "viewed" the painting on a list compiled by Freedman and shown to DeSole, testified that they do not "authenticate" works of art and were not asked to do so. But these experts, likely understanding that Knoedler intended to sell the painting, were shown the "Rothko" at Knoedler Gallery in a context (privately i.e., not at a public exhibition) expressly designed to elicit their views/opinions or comments about authenticity of the painting. When the authenticity of visual art is in question, it is customary to consult experts familiar with the artist's work, whether or not they formally "authenticate" the artist's work. The question for the seller then becomes how to describe expert reaction to the painting. Must the seller advise the buyer that the experts listed did not authenticate the painting or simply allow the buyer to draw his own conclusion from the fact of the experts' viewing? *And, where the expert reaction is generically positive and therefore potentially ambiguous*

(deliberately or not) as expert comment very frequently is these days, the seller will risk a fraud claim for an overly optimistic description of the expert's views.

Thus, for example, Christopher Rothko, at his 2013 pre-trial deposition:

Q. Do you remember the first conversation you had with her [Freedman] on that topic?

A. I remember surely parts of it.

Q. What do you remember about that?

A. She asked me to come over to the gallery and she brought out work on canvas that she said was by my father and that it was from — it was from the private collection of a very --- a very private Swiss collector, said that this work was not in the catalogue raisonné. I don't think she asked me anything more specific, more what I thought.

Q. Do you remember what you responded to her question, what do you think?

A. I remember that I did not say anything very specific about it. I think I said it's beautiful. I did not say anything about whether it was or was not a Rothko or what I thought on that front . . . .

* * *

Q. When you met with Ann Freedman at Knoedler and saw the work, did she ask you your opinion of the work?

A. Yes.

Q. And how did you respond to her?

A. I don't remember saying anything specifically, except that I said it was beautiful.

Q. Did she ask you whether you believe the painting was an authentic Rothko?

A. No, she was not that direct.

Q. So she didn't ask you to authenticate the work?

A. That's correct.

Q. Did you ever talk with Ann Freedman about your practice of not authenticating works?

A. I don't know that I specifically said I don't authenticate, but I did indicate to her that was an area I didn't get involved with.[15]

Two other art historians, E.A. Carmean, Stephen Polcari, retained by Knoedler to examine certain of the Rosales Paintings, testified at their 2013 pre-trial depositions that they believed these Rosales Paintings to be authentic. However, Eugene V. Thaw, the co-editor of the 1978 Jackson Pollock Raisonné, expressed the view that he would not include a Rosales Painting, (said to be by Jackson Pollock) in any future supplement to the Pollock Catalogue Raisonné.

What Conclusions May Sellers Fairly Draw from Public Exhibition History?

Publicly exhibiting art at galleries, art fairs and similar public venues, especially art that may have issues of authenticity is a customary and useful way to allow numerous experts and scholars to informally examine the art. Such public exhibitions are important aspects of the provenance of a given piece of art and are usually expressly identified and cited by venue and date in scholarly publications. Indeed, pursuant to a loan request from Ernst Beyeler, the DeSole "Rothko" was exhibited, from May 25 through July 17, 2005, at "The Mark Rothko Rooms" at Foundation Beyeler, Basel, along with eighteen other (authentic) Rothko paintings.

Evidence of Fraudulent Intent in the Knoedler Case Goes to the Jury for its Decision

As noted above, much of the evidence (buy low/sell high, undisclosed negative opinion, major gaps/mistakes in provenance, etc.) is slim or ambiguous — so-called "red flags", warning of anomalous or inconsistent facts which

might cause a prudent seller/buyer to decline a purchase. However, the "bar" for sending evidence of fraudulent intent to the jury is fairly "low". Thus, the judge was on safe legal grounds in denying Knoedler's and Freedman's motions for summary judgment (on the intent issue, but *not*, as we shall see below, on the justifiable reliance issue), thereby allowing (largely red flag) evidence of fraudulent intent to go to the jury for its decision. (Although the judge would be obliged to instruct the jury that its conclusion must be based on "clear and convincing" evidence, and not just be a conclusion that is "more likely than not")

The second key element of a fraud claim: buyer's justifiable (reasonable) reliance on the (fraudulent) misrepresentation

Well-established art galleries should be concerned about whether they are being held to a higher standard, even when they are dealing with very sophisticated purchasers represented by independent art advisors.

Factors Considered by Courts in Determining whether Buyer Reliance Was Justifiable

In assessing whether a buyer's reliance on a fraudulent misrepresentation is "justifiable" New York law takes a contextual view, focusing on the level of sophistication of the parties, the relationship between them, and the information available at the time of the operative decision, in this case, the purchase of a painting. But where a buyer has the means to discover the true nature of the transaction by the exercise of ordinary intelligence, and fails to make use of those means, he cannot claim justifiable reliance on seller's misrepresentations. That is to say:

> If the facts represented are not matters peculiarly within [seller's] knowledge, and the [buyer] has the means available to [buyer] of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation, [the buyer] must make use of those means, or [buyer] will not be heard to complain that [buyer] was induced to enter into the transaction by misrepresentations.[16]

New York courts consider multiple factors in evaluating the reasonableness of a buyer's reliance, including the following: whether the seller received any "clear and direct" signs of falsity, or had access to relevant information, or received written confirmation of the truthfulness of the representations at issue, and whether the buyer is "sophisticated."[17]

Significance of the Art Buyer's Relative Sophistication when bringing a Fraud Claim

Generally, in commercial transactions, *the greater the sophistication* of the buyer, *the more inquiry is required.* A sophisticated buyer cannot establish he entered into an arm's length transaction in justifiable reliance on misrepresentations if that buyer failed to make use of the means of verification that were available. Where sophisticated businessmen engaged in major transactions enjoy access to critical information but fail to take advantage of that access, New York and other courts are disinclined to entertain claims of justifiable reliance.

Judge Gardephe, in his 2015 opinion denying defendant's motion for summary judgment, states:

> Freedman contends that Plaintiffs are sophisticated art collectors who had the opportunity to investigate her alleged misrepresentations before purchasing the works. Freedman contends that had plaintiffs performed "even minimal [due] diligence" they would have learned the facts that provide the basis for their fraud claims. Although it is true that Plaintiffs had purchased works of art before, this Court cannot conclude — as a matter of law — that Plaintiffs' alleged sophistication and experience rendered them unreasonable in relying on Freedman and Knoedler's representations concerning the paintings.[18]

Sophisticated Art Collectors Are Required to Do More Investigation. What Would be Sufficient, if DeSole Did Not Reach This Standard of Sophistication?

Three facts suggesting the DeSoles were sophisticated art collectors:

1. As quoted above, Judge Gardephe's 2015 opinion allows that "Plaintiffs had purchased works of art before." In fact, earlier in 2004, DeSole had purchased another work by Mark Rothko, entitled "Blue, Black, Blue

Rothko" from dealer Anthony Grant, and had requested and received an "authentication letter" stating that the work was "an authentic work by Mark Rothko and confirming that the provenance stated in the letter was "true and correct."

2. Plaintiff, Domenico DeSole, was an independent Director of Sotheby's, and, subsequent to the purchase of his second Rothko, Chairman of Sotheby's; Chairman and co-founder of Tom Ford International, Director of Gap, Inc.; former President & C.E.O. of Gucci Group; a 1972 graduate of Harvard Law School, and a member of the Advisory Board of Harvard Law School.
3. DeSole collected art for decades, purchased a single work for more than $1 million and owned 115 works of art with an insured value of more than $26 million.

Question for Future Cases

Does the Involvement of an Art Advisor Change the Seller's Disclosure and Buyer's Diligence Obligations?

The *Knoedler* case also raises some interesting questions about how galleries should conduct themselves with art advisors. It would seem reasonable for a dealer communicating with an art advisor representing a collector to assume that the art advisor will inform his client of the risks that would seem obvious to anyone with extensive professional experience in the field — i.e., to assume that the purchaser is a sophisticated buyer, by virtue of employing a professional advisor. But, based on the *Knoedler* case, that would be a mistake.

DeSole retained an art advisor, James Kelly, who had worked in art galleries for thirty years and had advised the DeSoles on their art purchases since the late 1990s. Kelly owned his own gallery specializing in contemporary art. Kelly advised the DeSoles on their first Rothko purchase and then again on their purchase from Knoedler of the fake Rothko, the subject of the DeSole claim.

Kelly and DeSole entered into a written art advisory agreement in which Kelly was to determine *only* whether the $8.5 million price was a "fair price". The advisory agreement did not require Kelly to investigate the authenticity of the painting.[19] Kelly viewed the painting at Knoedler during a 30-45 minute meeting with Ann Freedman, Knoedler's Director. Kelly testified that he knew the picture was not in the Rothko catalogue raisonné but did not think this omission from the Rothko catalogue raisonné was relevant to his fair price assessment. Kelly did not ask whether there was any documentation to support the provenance of the picture, nor did DeSole ask him to make an inquiry, and Kelly did not ask to talk to any of the experts listed as having viewed the picture in order to find out if any of them had authenticated the painting or been asked to do so.[20]

So what is a seller to do? Inquire regarding the scope of the art advisor's work? That question will not readily be answered by either buyer or his art advisor. Does the seller need to pretend that the art advisor is not an experienced professional, and tell the advisor all that one would say to a collector who did not have professional advice? That would be an impractical and awkward conversation. Does the seller need to insist on speaking to the collector personally along with the advisor? The advisor may view that as an attempt to poach a client, and insisting may simply irritate the client and spoil the sale. None of these options seem to reflect the realities of the art market.

Do Written Representations by the Gallery Excuse Collectors from the Obligation to Perform Reasonable Diligence? Only For Representations Listed in the Writing, or for Other Representations, Too?

The evaluation of written representations should also be troubling to dealers, as it seems to absolve the buyers of the obligation to perform any diligence, and puts the dealer at risk of a *fraud* claim if the representations are disputed. Judging from the *Knoedler* decision, dealers and sellers should be extremely careful in drafting these representations. (Such as the increasingly common request for a warranty that seller has provided "all information" about the work).

Judge Gardephe cites a New York Court of Appeals decision stating:

> Where a plaintiff has gone to the trouble to insist on a written representation that certain facts are true, it will often be justified in accepting that representation rather than making its own inquiry.
>
> * * *
>
> [W]e held that it was reasonable for the plaintiff to rely on a written representation as a substitute for making an investigation of the facts represented.[21]

As an initial matter, it is *wholly unclear* to this writer why *any* court should take the position that "going to the trouble" of getting a "written representation of facts" should relieve a fraud plaintiff from being required to inquire into the misrepresented facts.

Under the New York Arts and Cultural Affairs Law, a sale of art by a dealer to a collector accompanied by invoice describing the work as created by a certain artist results in a contractual warranty of the authenticity. Thus, the DeSoles were beneficiaries of a statutory warranty of authenticity at the time of their 2004 purchase. When they requested a letter from Knoedler, they were asking for *more* — namely confirmation of other facts, such as that certain experts had authenticated the painting.

Judge Gardephe's 2015 opinion states *(inaccurately)* that the DeSoles received "written confirmation of the truthfulness of the representations at issue":

> The DeSoles requested and received a December 11, 2004 letter from Freedman in which she confirmed all of her earlier oral representations about the painting they later purchased, including its authenticity and provenance.[22]

Plaintiff DeSole did in fact *request* a letter confirming earlier representations. Thus, in his pre-trial deposition, DeSole testified as follows:

Q. … did you ask anyone to contact any of the people on this list in connection with the … purchase of the work of art?

A. No …

Q. Did you ask Ms. Freedman … for a certificate of authenticity?

A. … I wanted her to put in writing everything she said to me. Did I ask for something specific, the certificate of authenticity, I don't think so. …[23]

However, the letter, on Knoedler letterhead, and dated December 11, 2004, (in the actual form r*eceived* by DeSole, apparently without objection), stated *only* that: (1) the painting had been viewed by a number of Rothko scholars (but made no mention of any of these scholars authenticating the painting), and (2) the manager of the Rothko catalogue raisonné at the National Gallery, Laili Nasr, had written of her intention to include the painting in a forthcoming supplement to the catalogue raisonné. The letter did not address the lack of documentation of the painting's provenance, nor did it address the plaintiffs' allegation that Rothko scholar David Amfam had not seen the actual work — only a transparency, nor did the Freedman letter address the DeSoles' allegation in their complaint that Freedman had told DeSole that she knew the identity of the painting's owner.

And, in supporting his view that any investigation by the buyer would have involved "extraordinary effort or great difficulty", Judge Gardephe's opinion (commenting on another Rosales Painting) states:

> [E]ven assuming that "the truth theoretically might have been discovered," there is evidence in the record suggesting that any such discovery would be possible "only with extraordinary effort or great difficulty." The IFAR Report demonstrates the complexity of the task of ascertaining the authenticity and provenance of a work of art, particularly in the absence of any documentation concerning the painting. In preparing its report over a number of months, IFAR showed the "Green Pollock" to numerous Pollock experts; conducted "extensive archival and other research"; conducted materials and technical analysis; and closely examined the paint handling and style of

> the work, and the legitimacy of the purported Pollock signature. In sum, assuming that the forged nature of the paintings sold to plaintiffs could have been discovered, there is evidence in the record suggesting that the discovery would have come "only with extraordinary effort or great difficulty."[24]

But the "truth" Judge Gardephe refers to as being theoretically discoverable, only with great difficulty, includes, not just the painting's *authenticity* and *provenance*, but the truth about *numerous* other alleged seller misrepresentations — to wit, (1) the existence of documentary support for provenance; (2) whether experts, listed as having simply "viewed" the painting, had actually "authenticated" the painting; (3) whether David Anfam, a Rothko expert, had actually seen the picture, as opposed to only viewing a transparency; and (4) whether the National Gallery of Art would publish the picture in a supplement to their Rothko catalogue raisonné. *To be sure, none of these four questions would seem to require any "investigation" beyond a telephone call by the buyer to David Anfam, Christopher Rothko or to Laili Nasr at the National Gallery.*

Further, Judge Gardephe seems to be suggesting that what is to be "discovered" (but "only with extraordinary effort or great difficulty") is whether the picture was created by Mark Rothko and a documented provenance. No doubt achieving such knowledge is difficult, but New York law seems only to require the buyer claiming fraud to conduct "an investigation," an "independent inquiry," a "reasonable inquiry into any misrepresented facts," or "inquired further," and does not seem to require buyer "investigations" and "further inquiries" to finally arrive at the "truth" of the misrepresentation.

The most obvious action a buyer could take to conduct such an inquiry or further investigation before the purchase, is to retain an expert adviser. And, indeed, DeSole did so, retaining his long-time art advisor, James Kelly. However, Kelly's advice was expressly *restricted* by DeSole to determining a "fair price" for the painting (presumably because DeSole chose to rely on Knoedler/Freedman for other facts about the purchase).

Judge Gardephe Finds that DeSole Did Not Deliberately Fail to Confirm Facts and Expert Opinions in Order to Obtain a Lower Price

Defendants Knoedler and Freedman cited a recent case, *ACA Galleries*, which found for the art seller on the grounds that the buyer could have consulted the Avery Foundation for its opinion on authenticity, but chose not to do so. Judge Gardephe's opinion distinguishes *ACA Galleries*, in which ACA, the plaintiff art gallery, sued an individual seller for fraud over its purchase of a forged Milton Avery painting. The Second Circuit Court of Appeals said that the Avery Foundation was available to authenticate the painting prior to the sale, but ACA declined to conduct such an inspection until after sale:

> When shown the painting, the Avery Foundation concluded that it was not authentic. … ACA failed to avail itself of the opportunity to have the painting inspected by the Avery Foundation or another expert prior to purchase, and instead, relied only on [its President's] inspection … ACA is in the business of buying and selling art. Such a business must be cognizant of forgery of the works of well-known artists like Avery. … ACA was aware that an authentication by the Foundation "would make the painting more saleable at a higher price." ACA could have accepted the higher price that accompanies certainty of authenticity, but chose instead to accept the risk that the painting was a forgery.[25]

Judge Gardephe rejected the analogy to the ACA case in the following words:

> The facts here are not comparable. Plaintiffs [DeSoles] do not operate art galleries, and they are not in the business of buying and selling works of art. Instead, they are consumers who relied on representations made by one of the most reputable and most established art galleries in New York City. *There is also no evidence that Plaintiffs made a strategic decision not to seek an expert opinion.*[26] [emphasis added]

It is hard to know what to make of Judge Gardephe's opinion concerning DeSoles' "strategic decision." Certainly DeSole, aware, as he was, of the provenance and catalogue raisonné issues, made a decision to retain the services of Kelly as a professional art advisor, but then explicitly limited Kelly's advice to the fairness of the price.

Whatever meaning the judge ascribes to his adjective "strategic," it is clear that the DeSole buyers retained an expert art adviser for his opinion about a fair price for painting, but *not* for his opinion about the authenticity of the painting, and *not* for an investigation of any facts represented to the buyers.

Is There Now a "Prestigious Gallery" Rule Excusing Collectors from Reasonable Diligence? Is Caveat Emptor Still Alive with respect to the "Other" Galleries?

In general and in specifics, DeSole, made clear that he relied on Knoedler Gallery's reputation and did not verify or question easily verifiable facts about the painting represented to him by Knoedler and Freedman. At his 2013 pre-trial deposition, DeSole was asked about the December 11, 2004 letter he received from Ann Freedman which stated, "Importantly, Laili Nasr, manager of the Rothko Catalogue Raisonné for the National Gallery of Art in Washington, D.C. has written us about her intention to include the Rothko in the forthcoming catalogue Raisonné supplement." The DeSole deposition continued:

Q. Did you rely on that statement in any way in connection with your purchase of the work?

* * *

Q. Did you ever contact the National Gallery of Art to inquire into the truth of or not of that statement?

* * *

A. I just want to say that just to make clear if I go to Tiffany, I'm not going to call a mine in Zimbabwe to find out if the diamond was true or not, when it was mined. Okay? I just rely on the reputation of Tiffany. If I buy a Porsche and I pay what I'm supposed to, I'm not asking the mechanic to confirm every piece has made in Germany. Does that answer your question?

Q. Absolutely.[27]

Plaintiff DeSole thus puts his position very clearly, to wit, he bought from a gallery with a sterling reputation and therefore was not required to investigate facts the gallery provided. But, if this is the law in New York, how do courts in future cases of fraud claims decide the extent of buyer's diligence obligation when the selling art dealer is less well-known and less established? Will the major auction houses be held to this higher standard?

As detailed above, evidence of DeSole's self-protective diligence was very close to non-existent. It is arguable that the judge effectively read the requirement of buyer's reasonable reliance out of New York law in this case.

Disconcerting Ease with which Fraud Allegations can Now be made in Art Sales

The Knoedler case presented elements which are not uncommon for many art sales. A dealer sells forged art with a New York statutory warranty of authenticity but the buyer's contractual warranty claim is barred by the four-year statute of limitations of the Uniform Commercial Code. The unhappy collector then is obliged to make a fraud claim against the dealer, chiefly citing a number of elements, so-called "red flags", warning of risk. First, the dealer bought at very low price and sold to the collector at a very much higher price. Second, some experts thought the piece was not authentic; and some thought it was. Third, the DeSole "Rothko" was shown to a number of experts who expressed varying degrees of enthusiasm (but were not asked to, and did not formally authenticate the piece). Fourth, the agent of the supposed owner/seller would not identify the owner/seller, or supply any other provenance information to the dealer and, to the extent the dealer was able to research provenance, that provenance research was speculative and unsupported. On the collector's side, the collector's required due diligence was limited to reliance on the strong reputation of a long-time dealer, notwithstanding that the collector knew (a) the owner was unidentified and (b) the "Rothko Painting" was not listed in the accepted Rothko Catalogue Raisonné. What might strike art dealers (and other art sellers) about these elements — circumstantial evidence or red flags[28] from which Judge Gardephe decided that a jury could find seller's fraudulent intent and buyer's diligence — is how frequently some, or many of these factual elements are found in art transactions. (Indeed, there will *often* be gaps and outright mistakes in descriptions of provenance.)

After The Knoedler Case

Thus, after the Knoedler litigation, an unhappy buyer of a forgery (whose warranty claim is barred by the statute of limitations four years after purchase) will be able to have a jury decide the question of seller's fraudulent intent based on conclusions a jury could properly draw from any one of a number of fairly common and ambiguous factual circumstances (buy low, sell high; undisclosed negative expert opinion; major mistakes/gaps in provenance, etc.). And, apparently at least in the context of an art purchase, a buyer can satisfy his "reasonable reliance" obligation by doing very little more than asserting his reliance on his prestigious seller's sterling reputation.

An anomaly — New York State and federal courts have long applied a forgiving standard to an art seller's obligations under a contractual *warranty* of authenticity. A federal district court opinion, *Dawson v. Malina*,[29] decided the standard for determining a breach of seller's warranty is whether there was a *reasonable basis in fact* for an attribution of a work at the time the warranty was made (the date of sale), *not* whether the attribution can be proven to be true or false based on information coming to light after the sale. The major auction houses reiterate a variation of this standard in their conditions of sale, and specify that if the attribution was consistent with generally accepted expert opinion at the time of sale, the purchase price will not be refunded.

By contrast with a warranty claim, a defendant art seller accused of *fraud* (typically having sold the art with a one-page invoice) might well have made oral representations or failed to disclose negative information of some sort, or otherwise disregarded a "red-flag" — thereby providing evidence of fraud that could go to a jury. In short, after the Knoedler litigation, an art buyer might *more easily make a fraud claim than a warranty claim.*

Of course, it is highly desirable for an art buyer, having bought a forgery, to be made whole by a return of his purchase price. And, of course, this is the strong public policy behind the New York statutory warranty of authenticity given to a collector by an art dealer. But, where a warranty is not (or no longer) available to protect the buyer, a fraud claim puts in play the jury's factual determination of fraudulent intent. In this circumstance, with the public policy goal of stability and predictability of art sales, courts should give more careful consideration to the requirement that the buyer be diligent — that the buyer shall have taken reasonable action, where possible, to protect against fraud.

The risk of buyer fraud claims against art sellers has always existed, but after the Knoedler litigation, buyer fraud claims seem much more likely to be asserted and the risk to art sellers much more real.

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NOTES

[1] In addition, beginning in 1994, Rosales had sold Knoedler nine paintings (5 Diebenkorn, 3 Sam Francis and one Warhol) with falsified Spanish provenance.

[2] *DeSole v. Knoedler Gallery LLC*, 139 F.Supp.3d 618, 644-45 (S.D.N.Y. 2015).

[3] *Id.* at 640 (quoting *Chambers v. TRM Copy Ctrs. Corp.*, 43 F.3d 29, 37 (2d Cir. 1994)).

[4] Knoedler purchased the DeSole "Rothko" for $950,000 in 2004 and sold it two years later for $8.3 million.

[5] Deposition Transcript of Sharon Flescher, dated Apr. 30, 2013, at 132, 154 (Plaintiff's Ex. 16, Doc. No. 236-2).

[6] 2005 EWCA Civ. 555; Case no. A2/2004/146 & 1470.

[7] Ronald D. Spencer, 4 SPENCER'S ART L.J 2, 2 (2013).

[8] Vol. 2 *Harper, James & Gray On Torts*, Section 7.14 (3rd ed. 2006).

[9] *Id.* at 556.

[10] Under the "special facts" doctrine, a duty to disclose arises "where one party's superior knowledge of essential facts renders a transaction without disclosure inherently unfair". *Beneficial Commercial Corp. v. Glick Datsun*, 601 F. Supp. 770, 773 (S.D.N.Y. 1985). *But see Chiarella v. U.S.*, 445 U.S. 222, 248 (1980) ("This Court has never so held."). It is curious that, while some courts have applied the special facts doctrine to impose a duty of disclosure on the seller, no corresponding duty is usually placed on the *buyer* where the buyer has knowledge of facts, not reasonably discoverable by the seller, which render the property much more valuable than the price being asked.

[11] Spencer, *supra* note 6, at 5.

[12] *Restatement (Second) of Torts* §551, Comment j (1977). The Reporter stated that the advisers were unanimous in wishing to limit [§551(2)(e)] to (facts 'basic to the transaction') and concluded, [t]he law may be moving in the direction of requiring disclosure of ('material' facts) but it is not yet sufficiently clear to justify more than 'basic.' Restatement (Second) of Torts §551, pp. 166-67 (Tent. Draft No. 10, 1964).

[13] *Id.*

[14] *Harper, James & Gray*, *supra* note 6, at 565-66.

[15] Deposition Transcript of Christopher Rothko, dated Jan. 16, 2013, at 25, 50-51 (Plaintiff's Ex. 32, Doc. No. 236-4). At the subsequent Knoedler trial before Judge Gardephe, in early February, 2016, in response to questions about his expertise concerning his father's art, Christopher Rothko acknowledged that he had lectured and delivered scholarly papers about his father's art around the world over many years.

[16] *DDJ Mgmt., LLC v. Rhone Group LLC*, 15 N.Y.3d 147, 154 (2010) (quoting *Schumaker v. Mather*, 133 N.Y. 590, 596 (1892)).

[17] *See id.* at pp. 154–55; *JP Morgan Chase Bank v. Winnick*, 350 F.Supp.2d 393, 408 (S.D.N.Y. 2004); *Crigger v. Fahnestock and Co., Inc.*, 443 F.3d 230, 235 (2d Cir. 2006).

[18] *DeSole*, 139 F.Supp.3d at 646.

[19] *See* Deposition Transcript of James Kelly, dated May 14, 2013, at 139–41 (Plaintiff's Ex. 23, Doc. No. 236-3).

[20] But Kelly was instructed by DeSole to ask for a discount off the $8.5 million price, which he requested on DeSoles' behalf and was accorded a $200,000 discount to $8.3 million by Knoedler. In the event, Kelly kept $100,000 of the discount, so that DeSole paid $8.4 million.

[21] *DeSole*, 139 F.Supp.3d at 646–47 (citing *DDJ Mgmt.*, *supra* note 15, at 154).

[22] *Id.*

[23] Videotaped Deposition of Domenico DeSole, dated May 10, 2013, at 188 (Plaintiff's Ex. 10, Doc No. 236-2).

[24] *DeSole*, 139 F.Supp.3d at 647 (internal citations omitted).

[25] *Id.* at 647 n.27 (citing *ACA Galleries v. Kinney*, 928 F.Supp.2d 699, 703–04 (S.D.N.Y. 2013), *aff'd*, 552 Fed.Appx 24 (2d Cir. 2014)).

[26] *Id.* (emphasis added).

[27] Videotaped Deposition of Domenico DeSole, *supra* note 22, at 182–84.

[28] Different, of course, from buyer's direct factual allegations of "fabricated stories of provenance" and "efforts to concoct a cover story with Rosales" — allegations, denied by seller, the truth of which the jury would decide.

[29] *Dawson v. Malina*, 463 F. Supp. 461 (S.D.N.Y. 1978).